PRIVY COUNCIL REPORT

SAMINATHAN v. PAPPA

[Privy Council (Lord Hailsham of St. Marylebone L.C., Lord Diplock, Lord Edmund-Davies, Lord Russell of Killowen & Lord Roskill) October 15 & November 17, 1980]

[Privy Council Appeal No. 20 of 1978]

Land Law — Whether registered title indefeasible — Fraud — Burden of proof — Transfer effected under power of attorney — Sufficiency of power of attorney — Allegations of fraud not pleaded — Conflict of oral evidence — Documentary evidence relied on by Federal Court — National Land Code, s. 340.

Evidence — Onus of proof of fraud — Proof beyond reasonable doubt.

Practice and Procedure — Appeal — Conflict of oral evidence — Appellate Court relying on documentary evidence.

In this case land in Selangor had been transferred to the respondent. The lands belonged to one Palaniandy who had appointed the appellant his attorney in respect of his property, including the land. The appellant acting as the duly constituted attorney of Palaniandy, gave the respondent an irrevocable power of attorney purporting to authorise the respondent to transfer the said land to herself. Subsequently the appellant and the respondent entered into an agreement to sell the land to the respondent. The land was then transferred and registered in the respondent's name on the strength of the two powers of attorney and a statutory declaration. In the declaration the respondent declared that Palaniandy and the appellant were in India. Notwithstanding the transfer of the registered title to the respondent, the appellant continued to occupy and cultivate the land. The respondent commenced proceedings for trespass against the appellant. In his defence the appellant counterclaimed that the respondent had transferred the land into her name fraudulently and by means of a void instrument. The learned judge in the High Court found in favour of the appellant (see [1975] 1 M.L.J. 263) and the respondent appealed to the Federal Court. The Federal Court held that as the respondent was the registered proprietor of the land her title was indefeasible and the burden was on the appellant to prove fraud or misrepresentation to which the respondent was a party or that the registration of the respondent as proprietor was obtained by means of an insufficient and void instrument. The Federal Court further held that the appellant had failed to prove the allegations beyond reasonable doubt and they allowed the appeal and gave judgment for the respondent. The appellant appealed.

Held: (1) whatever might have been the position under section 340(2)(b) of the National Land Code as regards the sufficiency of the Second Power of Attorney if the power to transfer the land had been exercised by the respondent before the sale agreement had been made, any defects in her power to execute the transfer were cured by the coming into existence of the sale agreement before the power was exercised. The Federal Court was therefore right in holding that the learned judge's holding to the contrary was wrong;

(2) the onus of proof of fraud in Malaysia is proof beyond reasonable doubt;

(3) in the pleadings there was only one allegation of fraud *viz.* that the respondent had misrepresented to the Collector of Land Revenue that the appellant desired the transfer of the title of the land to her. There was no evidence that any such representation was ever made to the Collector of Land Revenue and therefore the Federal Court were clearly entitled, if not bound, to reject the learned judge's finding in this matter;

(4) there were two other findings by the learned judge of fraud that had not been pleaded. The first was that the respondent's application to the Ruler in Council for consent to the transfer was supported by a statutory declaration in which she stated that Palaniandy and the appellant were "still living in India". The statement that the appellant was in India was not correct but there was no evidence that it was relevant to the decision of the Ruler in Council. If the appellant was relying on this misstatement as having induced the Ruler in Council to assent to the transfer it was for him first to plead it and then to prove it beyond reasonable doubt. As he had failed to do this, the Federal Court were right in holding that this finding of fraud by the learned judge cannot stand;

(5) the second finding of unpleaded fraud made by the learned judge arose out of the sale agreement and the payment of the purchase price. There was conflict of oral evidence on this point but the learned judge held that the respondent had not proved that she had paid the full purchase price at the time of the transfer. The Federal Court relied on the documentary evidence and rejected the learned judge's reasoning on this point. The failure of the respondent to pay the purchase price in full and punctually, even if proved beyond reasonable doubt, could not in law amount to fraud or entitle the unpaid vendor to defeat the registered proprietor's title;

(6) the respondent as registered proprietor had an indefeasible title to the land and as the appellant had failed to prove fraud or misrepresentation or that the registration was obtained by means of an insufficient instrument, she was entitled to judgment against the appellant.

Case referred to:-

(1) *Narayanan* v. *Official Assignee, Rangoon,* A.I.R. 1941 P.C. 93.

[The following cases were also cited in the argument before the Federal Court: *Smith* v. *Essery & Brown* (1890) 9 N.Z.L.R. 449, 464; *Assets Company Ltd.* v. *Mere Roihi* [1905] A.C. 176, 210; *Derry* v. *Peek,* 14 A.C. 337; *Angus* v. *Clifford* [1891] 2 Ch. 449, 465; *Akerhielm* v. *De Mare* [1959] 3 All E.R. 485; [1959] A.C. 789; *Charles Rickards Ltd.* v. *Oppenheim* [1950] 1 All E.R. 420; *Panoutsos* v. *Raymond Hadley Corporation* [1917] 2 K.B. 473; *Alan & Co. Ltd.* v. *El Nasr Export and Import Co.* [1972] 2 All E.R. 127, 140; *Bryant Powis & Bryant* v. *La Banque du Peuple* [1893] A.C. 170, 177; *Subramania Pillay* v. *Sundarammal* [1968] 1 M.L.J. 30; *Jasbir Kaur* v. *Tharumber Singh* [1974] 1 M.L.J. 224; *Himatsing & Co.* v. *Joitaram* [1970] 2 M.L.J. 246; *Loh Boon Siew* v. *Chin Kim* [1972] 1 M.L.J. 139; *Tan Bing Hock* v. *Abu Samah* [1968] 1 M.L.J. 221; *Yeow Kim Pong Realty Ltd.* v. *Ng Kim Pong* [1962] M.L.J. 118; *Lim Siew Leong* v. *Vallipuram* [1973] 1 M.L.J. 241.]

FEDERAL COURT.

S. Kulasegaran (*Miss Ratna Singam* with him) for the appellant.

Dulip Singh for the respondent.

Cur. Adv. Vult.

Suffian L.P. (read by Ali Hassan F.J.): This is a dispute regarding the ownership of a piece of land held under E.M.R. 5087 which is in two lots, being padi land Lot 10600 and kampung land Lot 5406 in the Mukim of Tanjung Karang in the District of Kuala Selangor.

It is registered in the name of the plaintiff (appellant before us) but in the possession of the defendant (respondent before us). The plaintiff sued the defendant for a declaration that she is the registered proprietor and praying for, among other things, vacant possession. Her claim was dismissed by Haji Mohd. Azmi J. and she now appeals to us.

The facts, briefly, are as follows. The two lots were originally held under approved applications Nos. 814/50 and 79/57 under the old F.M.S. Land Code, the approved applicant being one Palaniandy son of Murugan.

In 1957, before leaving for India, Palaniandy appointed the defendant as attorney in respect of the land (see Power of Attorney No. 500/57 dated May 11, 1957, at pages 136 and 139 of the appeal record, hereinafter referred to as the first P.A.).

Five years later on or about July 9, 1962, the defendant executed an irrevocable Power of Attorney No. 739/62 authorising the plaintiff to convey the land to herself absolutely (see pages 152 to 155 of the appeal record) hereinafter referred to as the second P.A.

So on that date there were two P.As., one executed by Palaniandy in favour of the defendant and the other an irrevocable one executed by the defendant in favour of the plaintiff.

When Palaniandy obtained a grant of the land from the Government, it was on condition that the land was not to be transferred without the written consent of the Ruler in Council.

On or about January 6, 1967, the defendant applied to the Ruler in Council for consent to transfer the land to himself by virtue of the first P.A.

On or about August 10, 1967, the plaintiff and defendant entered into a sale agreement (Exhibit P2 at page 197) whereby the defendant agreed to sell and the plaintiff agreed to buy the land for $7,500. The agreement provided that the plaintiff was to pay the defendant $5,200 on the date of the agreement, leaving a balance of $2,300 to be paid on or before October 31, 1967.

Further the agreement expressly confirmed the second P.A. given by the defendant to the plaintiff.

Subsequent to the above agreement, on or about August 28, 1967, the plaintiff wrote to the Land Office the letter at page 190 to ask when she could obtain the document of title relating to the land.

On or about May 15, 1970, the Ruler in Council rejected the defendant's application to have the land transferred to him. The Land Office, Kuala Selangor, by letter dated May 25, 1970 (at page 164) told the plaintiff the defendant's application had been rejected by the Ruler in Council.

Subsequently on May 31, 1970, the plaintiff herself by letter (at page 163) applied to the Ruler in Council for consent to transfer the land to her. The Ruler in Council approved the plaintiff's application and subsequently on July 9, 1970, the land was registered in the plaintiff's name.

It would appear that some time in 1970 the defendant had entered into occupation of the land. He refused to vacate and the plaintiff filed against him the suit out of which this appeal arises.

In her statement of claim the plaintiff alleges that since March 1970, that is some four months before the land was registered in her name, the defendant has been a trespasser on the land. The plaintiff prays for a declaration that she is the registered proprietor of the land; for an injunction to restrain the defendant from interfering with her rights; for vacant possession; and for damages and other ancillary relief.

It would appear that she found her claim on two grounds:

(a) that her appearance on the register is valid by virtue of the two P.As.;

(b) alternatively that her appearance on the register was valid by virtue of the sale agreement (Exhibit P2).

As regards ground (a), the defendant pleads that the second P.A. was void because of want and/or failure of consideration or because of "the unlawful and excessive use of that power". The defendant also pleads that the plaintiff committed fraud on him by —

(1) applying to the Ruler in Council for the transfer of the land to her without the defendant's knowledge; and

(2) by misrepresenting to the Collector of Land Revenue that the defendant desired the transfer to the plaintiff.

As regards (b), the plaintiff pleads that on August 10, 1967, the defendant agreed to sell the land to the plaintiff for $7,500 that from the date of that agreement the defendant was to give possession to the plaintiff and would cease to exercise any right over the land, that on that date the plaintiff paid the defendant $3,200, that in addition one Gopal paid $2,000 to the defendant towards the purchase price on the plaintiff's behalf, that subsequently the plaintiff paid the balance of the purchase price ($2,300) and that pursuant to the second P.A. the plaintiff obtained the consent of the Ruler in Council for the transfer of the land to her.

The defence does not admit the sale but pleads that a sum of $2,300 was due to be paid by the plaintiff to the defendant on or before October 31, 1967, but that the plaintiff failed to do so.

The defendant counterclaims for, among other things: —

(a) a declaration that the second P.A. was void;

(b) a declaration that Palaniandy is still the proprietor and owner of the land;

(c) an injunction restraining the plaintiff from interfering with the defendant's rights in the land; and

(d) an order that the transfer of the land to the plaintiff be set aside.

Now as to the law, it is clear from section 340 of the National Land Code that the plaintiff's title to the land in dispute is indefeasible, but it may be defeated in case of fraud or misrepresentation to which she was a party or where registration was obtained by means of an insufficient or void instrument.

Section 340 of the National Land Code reads as follows:

"340. (1) The title or interest of any person or body for the time being registered as proprietor of any land... shall, subject to the following provisions of this section, be indefeasible.

(2) The title or interest of any such person or body shall not be indefeasible —

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) ....

(3) ...."

As the plaintiff's name is on the register and the defendant wanted it removed, in my judgment the burden is on the defendant to prove fraud or misrepresentation to which the plaintiff was a party, or that the registration of the plaintiff as proprietor was obtained by means of an insufficient and void instrument.

As regards fraud, the defendant must prove it not on a balance of probabilities but beyond reasonable doubt: see the Privy Council case of *Narayanan.*[1]

The learned trial judge held that the plaintiff was guilty of fraud or misrepresentation within the meaning of section 340 and that therefore her title was defeasible. He held that the Ruler in Council consented to the land being transferred to the plaintiff on the strength of the two P.As., that the plaintiff had falsely declared that the defendant was in India (in fact he was then in Malaysia) and that the plaintiff had misled the State authorities into thinking that both Palaniandy and defendant agreed to the transfer and were no longer interested in the land.

The learned trial judge found that the second P.A. was executed by the defendant on the understanding that the plaintiff would look after the defendant who was then seriously ill and would also look after his wife who was then going blind, that the plaintiff should transfer the land to herself only after the defendant's death and that the plaintiff knew all along that the power was given to her not for the purpose of selling the property to her.

The learned trial judge also found that by granting the second P.A. to the plaintiff the defendant had exceeded the authority granted to him by Palaniandy under the first P.A. and that therefore the transfer of Palaniandy's land by the plaintiff to herself was obtained by means of an insufficient or void instrument within the meaning of section 340(2)(b) of the National Land Code, and that accordingly the transfer was void.

As regards the plaintiff's claim that the land had been sold to her by the defendant by virtue of Exhibit P2, the learned trial judge held that the defendant executed the sale agreement, that the defendant had agreed to sell the land to the plaintiff, that neither fraud nor undue influence had been pleaded by the defendant as far as that exhibit was concerned, that it was therefore reasonable to infer that the defendant knew that the document was in respect of sale of the land. But the learned trial judge found as a fact that of the purchase price of $7,500 the plaintiff had paid only a sum of $3,200 and a further sum of $600, making a total of $3,800, and that the plaintiff had not paid a total sum of $3,700.

Accordingly, the learned trial judge dismissed the plaintiff's claim and allowed the defendant's counterclaim. He granted in favour of the defendant: —

(a) a declaration that the defendant's principal, Palaniandy, has been and is still the proprietor and registered owner of the land;

(b) a declaration that the second P.A. was null and void as far as it affected the land;

(c) an injunction restraining the plaintiff or her agents or servants or any person or persons claiming by or through her from interfering with the defendant's rights over the land in his capacity as Palaniandy's attorney; and

other relief.

The plaintiff appeals to us.

Before us it is submitted on behalf of the plaintiff that there are two issues:

(1) whether the title of the plaintiff is indefeasible;

(2) if her title is not indefeasible, then whether the plaintiff had discharged her obligations under the sale agreement (Exhibit P2) by paying the balance of the purchase price so as to entitle her to specific performance.

The gist of the argument is that the learned trial judge erred in considering the second P.A. in isolation and that he should have considered it together with the sale agreement (Exhibit P2) and an "I.O.U." chit (Exhibit P7) and that if he had done so he could and should have ordered specific performance of the sale agreement.

My conclusion is as follows.

The first P.A. given by Palaniandy in 1952 to the defendant gives him power among other things to do the following:

> "9. To sell to any person all or any of my lands... now belonging to me... and for the purpose to sign and to execute all transfers and other instruments necessary."

It is plain that under that clause the defendant had power to sell Palaniandy's land and for that purpose to sign and execute all transfers and other necessary instruments. In my opinion this includes power to sell the land in question to the plaintiff and to execute an irrevocable P.A. in her favour; this P.A. had to be irrevocable because there was at that stage no registered title to the land. In my judgment, when granting the second P.A. to the plaintiff and executing the sale agreement P2, the defendant was acting in accordance with the authority given to him by Palaniandy in the first P.A.

This second P.A. was on a printed form. It contains a typed acknowledgment by the defendant that he had received a consideration of $10. The solicitor who prepared this P.A. explained that consideration was inserted so that the power would survive the defendant's death. The P.A. also had typed in an additional clause (No. 24) by which the defendant authorised the plaintiff "to convey unto herself [the disputed land] ... absolutely". The significance of this clause was explained by the solicitor to the defendant.

It is true that the evidence of the solicitor which the learned judge accepted was that when executing the second P.A. the defendant did not intend to sell the land and that it was the intention of the plaintiff and defendant that the land was not to be transferred by the plaintiff to herself until after the defendant's death. This arrangement was made on the understanding that the plaintiff was to look after the defendant's wife and son after his death.

But with respect, the parties' intention in 1962 was superseded by their intention on August 10, 1967,

when they executed the sale agreement by which the defendant clearly agreed to sell the land to the plaintiff on certain conditions and in my opinion the validity of the registration of the plaintiff as proprietor has to be viewed in the light of this agreement also. If this agreement gave the plaintiff a good title, then in my opinion her title is indefeasible.

The next question that arises is this: has the plaintiff complied with the conditions of the sale agreement? More specifically, did the plaintiff pay the balance of the purchase price by the due date?

The learned judge was in error in finding that the plaintiff did not pay a total of $3,700, when the defence pleads that if there had been a sale which was not admitted, only a lesser sum ($2,300) remained outstanding.

Did the plaintiff pay this sum ($2,300) by the due date given by P2 as October 31, 1967?

The learned judge found that a sum of $600 was paid by the plaintiff to the defendant on or before that date, so that the only question that remains is whether or not the plaintiff did pay the defendant $1,700 by that date.

As to this the plaintiff said that she did pay though late and the defendant said that the plaintiff never paid at all. PW4 Mr. Vallipuram, a clerk at the Land Office, Kuala Selangor, and President of the Indian Temple, and an independent witness, however, was quite definite that the plaintiff did pay the defendant the $1,700 on January 25, 1968.

The learned trial judge however disbelieved PW4's evidence that the plaintiff paid the defendant $1,700 on January 25, 1968. If that had been the only evidence on this point, then it would not have been open to us to interfere with the judge's conclusion, but that was not the only evidence. There is also the written evidence of the endorsement at the back of the I.O.U. (Exhibit P7) executed by the defendant that day, which reads

"I, [defendant] being the holder of [the first P.A.] has this day extended the power given to me by Palaniandy to [the plaintiff] on [second P.A.] which is IRREVOCABLE. This power is in respect of [the land in question]. I [defendant] has this day sold the abovementioned land to [the plaintiff]. She may have the land transferred in her name and I have no claim over this land. In the event the authority do not approve the transfer then the whole sum including interest thereto is payable by me [defendant]."

In my judgment it would have been open to the learned judge to infer from the language of P7 that the plaintiff had paid the defendant $1,700; otherwise the defendant would not have agreed to refund it if the Ruler in Council refused to consent to the transfer of the land.

It is to be observed that the defendant affixed his thumb print impression on both sides of the I.O.U., and that he had the benefit of the advice and assistance of his son Muniandy who knew English.

I respectfully agree with learned counsel for the plaintiff before us that in view of this the learned judge should have found that a sum of $1,700 was paid by the plaintiff to the defendant on the day P7 was executed, namely January 25, 1968.

But the sale agreement provided that the balance of the purchase price was to be paid on or before October 31, 1967, and final payment was not made until January 25, 1968. Did late payment matter?

It is to be observed that the sale agreement did not contain any time clause and that time was not therefore of the essence of the contract. Even assuming that time was of the essence of the contract, the fact that the plaintiff and the defendant mutually varied the agreement by the plaintiff tendering and the respondent accepting the sum of $1,700 on a date subsequent to the date by which the amount should under the agreement have been paid (October 31, 1967) is in my judgment sufficient to estop the defendant from complaining that the plaintiff had not paid the money in due time.

As regards the plaintiff's alleged fraud in misrepresenting to the Ruler in Council that the defendant was in India when he was in fact in Malaysia and that Palaniandy and the defendant were no longer interested in the land, as already stated the burden is on the defendant to prove the plaintiff's alleged fraud beyond reasonable doubt. Has he done so? The only evidence of fraud came from the Collector who appeared in the witness box and who also handed over to the court the relevant file from his office. But with due respect I do not think that that was enough. There was no evidence that he was a member of the Executive Council that advised the Ruler on the defendant's and plaintiff's applications. It is true that the paper submitted to Executive Council on the plaintiff's application (page 159 of the appeal record) mentioned only the two P.As. and did not mention the sale agreement P2, but there was no evidence from any member or the Secretary of the Council or in what way the contents of the paper or omissions from it influenced their decision one way or another, it being quite well-known that even if all documents were in order the Ruler in Council could still refuse his consent to an application of this kind, decisions on which being made on grounds of public policy, not on considerations of law. I would therefore respectfully disagree with the learned judge that the defendant has satisfied the court beyond reasonable doubt that the plaintiff has been guilty of fraud.

It would appear from the correspondence between the plaintiff and the Land Office, especially the Collector's letter dated February 2, 1970, that the Collector was mainly interested in finding out whether or not the two P.As. in question were still valid at the time of the application.

During the course of arguments in this appeal it was stated on behalf of the defendant that the plaintiff applied for the Ruler in Council's consent before she had paid the full purchase price and that this showed fraud on her part. With respect I do not think that there is any merit in this argument, in the absence of any evidence whether or not this factor influenced Executive Council's decision one way or another.

It should be emphasised that there is no evidence in this case that Executive Council acted in any way like a registering authority to whom is presented a memorandum of transfer for registration. A register-

ing authority will not register such a document unless it is sure that all the formalities have been observed, but it is quite possible for Executive Council to consent to a transfer which may be agreed only in the future or to a transfer for which there is little or no consideration or even to refuse to consent to a transfer the instruments of which are all fit for registration.

Finally I deal with the point that the alleged consideration ($10) stated in the second P.A. had not in fact been paid by the plaintiff to the defendant. I do not think that this affected the validity of the transfer one way or the other because —

(1) at the time of the transfer this P.A. had not been revoked and the donor (defendant) was still alive; and

(2) a valid P.A. does not require consideration, *vide* section 138 of our Contracts Ordinance.

In the circumstances I would therefore allow the appeal.

I would set aside the learned judge's order and instead I would enter judgment allowing the plaintiff's claim and rejecting the defendant's counterclaim. Accordingly —

(a) there shall be a declaration that the plaintiff is the registered owner of the land in question;

(b) there shall be an injunction restraining the defendant or his agents or servants or any person or persons acting by or through him from interfering with the plaintiff's rights over the land;

(c) there shall be an order that the defendant and any person or persons holding by or through him do vacate the land and give vacant possession to the plaintiff not later than three months from today.

The plaintiff shall have costs here and below. Her deposit to be returned to her.

Ali Hassan and **Wan Suleiman F.JJ.** concurred.

From the above judgment the appellant appealed to the Privy Council.

PRIVY COUNCIL APPEAL FROM MALAYSIA.

K.S. Nathan (*Dulip Singh* with him) for the appellant.

S. Kulasegaran (*Christopher Kumara* with him) for the respondent.

Cur. Adv. Vult.

Lord Diplock (delivering the judgment of the Board): This appeal arises out of a dispute as to the ownership of approximately four acres of padi land in the State of Selangor ("the disputed land"). Miss Pappa, who was plaintiff in the action and is respondent to the appeal, became the registered proprietor of the disputed land on July 9, 1970 by registered transfer from the previous registered proprietor Mr. Palaniandy, who is not a party to the action. He was at all material times living in India but had given to the defendant in the action and appellant in this appeal ("Saminathan") a general power of attorney which authorised Saminathan *inter alia* to sell the disputed land — a power which he purported to exercise on August 10, 1967 when he entered into a written agreement to sell it to Miss Pappa for a price of $7,500 payable in two instalments of $5,200 and $2,300 respectively. Notwithstanding the transfer of the registered title to Miss Pappa, Saminathan continued to occupy and cultivate the disputed land. The present proceedings were commenced by Miss Pappa in March 1972 to vindicate her title and to enjoin Saminathan from trespassing on the disputed land.

As registered proprietor, Miss Pappa had an indefeasible title under section 340 subsection (1) of the National Land Code, unless Saminathan could bring the case within subsection (2) which provides:

"(2) The title or interest of any such person or body shall not be indefeasible —

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument...."

Saminathan eventually relied upon both of these paragraphs; their Lordships do not, however, find it helpful to refer to the pleadings in the action. The trial itself appears to have been conducted with a fine disregard of them — a procedure which, in their Lordships' view, is to be deprecated, particularly where allegations of fraud are involved. In the instant case it appears to have had the consequence of obscuring from the learned judge what the real issues were, and led him to find in favour of Saminathan.

Since their Lordships are in full agreement with the judgment of the Federal Court, which reversed the learned judge's judgment and contains a lucid summary of the relevant facts starting with the grant of the power of attorney by Palaniandy to Saminathan ("the Palaniandy P.A.") on May 11, 1957, their Lordships can restrict themselves to bare references to those facts only which are necessary to a proper understanding of the various defences, developed on behalf of Saminathan at the trial, upon which Azmi J.'s judgment in his favour was based.

The Palaniandy P.A., in addition to authorising Saminathan to sell the disputed land, gave him express power

"To substitute and appoint from time to time one or more attorney or attorneys with the same or more limited powers and such substitute or substitutes at pleasure to remove and another or others to appoint."

Five years later on July 9, 1962 Saminathan, who was apparently ill at the time, himself granted to Miss Pappa a general power of attorney ("the second P.A.") in substantially similar terms. It was expressed to be irrevocable and contained no reference to the Palaniandy P.A.: but it included an express provision in Clause 24 empowering Miss Pappa:

"To convey unto herself (grantee) the land held under A.A.814/505/B and 79/575B Sekinchang Kuala Selangor" [i.e. the disputed land] "absolutely."

There was no evidence that by July 9, 1962 Saminathan had agreed to sell the disputed land to Miss Pappa; and their Lordships agree that the Palaniandy P.A. did not empower Saminathan to authorise Miss Pappa to transfer to herself the title to the disputed land of which Palaniandy was still the regis-

tered proprietor except pursuant to an agreement for sale under which Miss Pappa was herself the purchaser.

This express power to transfer to herself the registered title to the disputed land, although it was granted at a time when no sale agreement was yet in existence, was not exercised until after Saminathan had entered into the agreement to sell the disputed land to Miss Pappa of August 10, 1967 ("the sale agreement") to which reference has already been made. The sale agreement contained express provision to the effect that the purchaser should obtain completion by using the powers vested in her by the second P.A. This she did on July 9, 1970, her registration being obtained by production of the Palaniandy P.A. and the second P.A.

Whatever might have been the position under section 340(2)(b) as regards the sufficiency of the second P.A. if the power to transfer the disputed land which it purported to confer upon Miss Pappa had been exercised by her before the sale agreement had been made, any defect in her power to execute the transfer was cured by the coming into existence of the sale agreement before the power was exercised. Their Lordships agree with the Federal Court that Azmi J.'s holding to the contrary was wrong. The learned judge does not appear to have appreciated the relevance of the sale agreement to the validity of the transfer.

Their Lordships accordingly now turn to the three findings of fraud on which the learned judge relied as defeating the registered title of Miss Pappa under section 340(2)(a). Only one allegation of fraud was made in Saminathan's pleading viz. that Miss Pappa had misrepresented to the Collector of Land Revenue that Saminathan desired the transfer of the title of the disputed land to her. There is a sentence in the trial judge's judgment which suggests that he found this allegation proved but counsel for Saminathan has been unable to point to even a shred of evidence that any such representation, whether true or false, was ever made to the Collector. The onus of proof of fraud in Malaysia is proof beyond reasonable doubt. In the circumstances the Federal Court were clearly entitled, if not bound, to reject, as they did, the judge's finding on this matter.

There were, however, two other findings by the judge of fraud that had *not* been pleaded. The title under which Palaniandy was registered as proprietor of the disputed land was subject to a condition that it should not be transferred without the consent of the Ruler in Council; and the first of the judge's two findings of unpleaded fraud was based upon a statement in a Statutory Declaration made by Miss Pappa on March 11, 1970, in support of her application for consent to and registration of the transfer. She there stated that Palaniandy and Saminathan were at that date "still living in India". This was accurate in stating that both were living, a matter of importance, since powers of attorney cease to be effective upon the grantor's death; but it was inaccurate in stating that Saminathan was then living in India; he was in fact living in Malaysia. There was no evidence that, when deciding to approve the transfer, either the Executive Council of the State or the Collector of Land Revenue, to whom the statutory declaration was sent, attached any importance to whether Saminathan was living in India or Malaysia, so long as he was still alive; nor was counsel for Saminathan able to suggest any reason why this particular piece of information should be relevant to a decision to approve or reject the transfer that appeared plausible to the members of the Federal Court, who are familiar with the way in which the system of registration of titles in Malaysia works in practice. If Saminathan was relying upon this misstatement as having induced the Executive Council to assent to the transfer it was for him first to plead it and then to prove it beyond reasonable doubt. Their Lordships agree with the Federal Court that this finding of fraud by the learned judge cannot stand.

The second finding of unpleaded fraud made by the learned judge, to which a considerable portion of his judgment was devoted, arose out of the sale agreement and the payment of the purchase price thereunder. The existence of the sale agreement was undisputed, but there was considerable conflict of oral evidence as to whether the whole of the purchase price had been paid before the date of registration of the transfer and if so when individual instalments of it had been paid. Such documentary evidence as there was supported Miss Pappa's claim that it had all been paid by July 9, 1970; but it was conceded that the second instalment had been paid some three months after the contract date, albeit more than two years before the transfer itself. An issue as to underpayment was raised upon the pleadings where it was relied on by Saminathan as a breach of condition; but the judge appears to have considered that if Miss Pappa relied upon the sale agreement as justifying her use of the second P.A. in order to effect the transfer to herself of the registered title to the disputed land, an onus lay upon her to prove that the purchase price thereunder had been paid in full and punctually and that no onus lay upon Saminathan to prove the contrary. In this, as the Federal Court pointed out, he was clearly wrong. The learned judge, although he referred to the conflicting evidence as to payment in considerable detail, was unable to reach any positive finding of fact. All he could do was to express his view that, on the evidence, Miss Pappa had not satisfied the onus of proving full and punctual payment. Her failure to satisfy this onus he treated as equivalent to actual proof of a breach of condition of the sale agreement despite the fact that time had not been made the essence of it, and he went on to hold that Miss Pappa was acting fraudulently in registering the transfer because she had not proved that she had by that date paid the full purchase price.

The Federal Court rejected the learned judge's reasoning on this part of the case. They also considered that despite the conflict of oral evidence the documentary evidence was strong enough to justify them in making their own finding of fact that the purchase price had been paid in full before the transfer and had been paid punctually except as regards a sum of $1,700, part of the second instalment, which was paid three months late. Their Lordships, however, do not find it necessary to canvass the justification

for that finding of fact by the Federal Court which the trial judge had refused to make. Miss Pappa's failure to pay the purchase price in full and punctually, even if proved beyond reasonable doubt, could not in law amount to fraud or entitle the unpaid vendor to defeat the registered proprietor's title under section 340(2)(a).

Their Lordships will advise His Majesty the Yang di-Pertuan Agong that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors: *Graham Page & Co.; Philip Conway Thomas & Co.*

SINGAPORE REPORTS

THE GREAT EASTERN LIFE ASSURANCE CO. LTD. v. GOH AH KOW t/a SINGAPORE DRY CLEANERS & ANOR.

[C.A. (Wee Chong Jin C.J., Sinnathuray & Chua JJ.) May 6, 1980]
[Singapore — Civil Appeal No. 53 of 1979]

Landlord and Tenant — Rent-controlled premises — Claim for possession — Whether defendants were licensees or tenants — Control of Rent Act (Cap. 266), s. 27(a).

This appeal arose from a claim brought by the plaintiffs/appellants in the District Court against the first, second and third defendants for possession of a rent-controlled premises at No. 204 Orchard Road. The said premises were let to the first defendant sometime during the Japanese occupation.

The plaintiffs claimed possession against the first defendant under section 27(a) of the Control of Rent Act (Cap. 266) on the ground that he was not in occupation of the premises and against the second and third defendants on the ground that they were unlawfully in occupation. The first defendant consented to judgment. The trial then proceeded against the second and third defendants.

The facts revealed that in 1945, the second defendant had approached the wife of the first defendant, who then held a tenancy of the said premises, and asked to be allowed to take over the tenancy of the premises. This was agreed to. The first defendant then moved out of the premises and retained a connection with it in that the rent was payable to him and he would tender this to the landlords. The third defendant had come on to the premises in 1959 after he had married the second defendant's daughter. The first defendant did not object to his coming on the premises.

The learned District Judge held that the plaintiffs had failed to determine the contractual tenancy of the first defendant. The learned District judge dismissed the plaintiffs' claim on the ground that the plaintiffs had not proved that the second and third defendants were unlawfully in occupation of the premises as they were in occupation of the premises with the leave and licence of the first defendant, and accordingly were not trespassers. The plaintiffs appealed to the High Court. The appellate Judge dismissed the appeal. (See [1980] 1 M.L.J. 277).

Held, dismissing the appeal: (1) the first defendant had sub-let the whole of the premises to the second defendant and that the first defendant was not prohibited under his contractual tenancy from sub-letting without the prior consent of the plaintiffs as his landlord;

(2) the relationship between the first defendant and the second defendant was that of landlord and tenant and not that of licensor and licensee;

(3) the second defendant had a tenancy of the premises from the date she entered into possession in 1945 and was a protected tenant by virtue of the Control of Rent Act (Cap. 266) when proceedings for possession were commenced against her.

CIVIL APPEAL.

Kirpal Singh for the appellants.

Tommy Neo for the respondent.

Cur. Adv. Vult.

Chua J. (delivering the judgment of the Court): At the end of the hearing of the appeal we dismissed the appeal and said we would give our reasons later. We do so now.

This appeal arises from a claim brought by the plaintiffs (appellants) in the District Court against the first, second and third defendants (the second and third defendants are the first and second respondents)